STATE OF MICHIGAN

COURT OF APPEALS

TOM NOBLE, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED October 7, 2010
v	No. 292080 Ingham Circuit Court
OFFICE OF THE RACING COMMISSIONER, Defendant-Appellant/Cross-Appellee.	LC No. 08-000703-AA

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Defendant appeals by leave from the circuit court's order reversing defendant's disciplinary action against plaintiff. We reverse the circuit court's order and remand for reinstatement of the final administrative decision. We reject the arguments plaintiff presents in his cross-appeal.

This administrative action arose from the use of an anti-inflammatory drug in a racehorse. Plaintiff, who is a horse trainer, administered flunixin to a horse after the horse sustained an injury. A week later, plaintiff entered the horse in a race, and the horse won. A subsequent urine test indicated that flunixin was present in the horse's body. Because flunixin is not authorized for use in horses that participate in a race, defendant disciplined plaintiff.

Plaintiff appealed to the circuit court. The court found that plaintiff had violated the controlling statutes, MCL 431.316 and MCL 431.330. Nonetheless, the court reversed defendant's decision. The circuit court determined that defendant's decision was arbitrary and capricious, and that the decision violated plaintiff's substantive due process right. We review the circuit court's factual findings for clear error and review de novo the court's legal conclusions. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 62; 678 NW2d 444 (2003). We review de novo the constitutional issue. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 25; 703 NW2d 822 (2005).

We find no clear error in the circuit court's factual findings, but we conclude that the court erred in applying the law to the factual findings. On the basis of the record, the circuit court correctly found that plaintiff administered flunixin to the horse while it was under his care, that flunixin is not authorized for use in a horse that participates in a race, and that flunixin was

present in the horse after the race. The circuit court also correctly concluded that the presence of flunixin violated MCL 431.330 and that plaintiff violated MCL 431.316.

The circuit court erred, however, in concluding that defendant's decision to enforce the statutes as written was arbitrary and capricious. The court appears to have determined that application of the strict liability standard in MCL 431.316 was inappropriate in this case. The statute does not allow judicial adaptation. The statute plainly mandates that a horse trainer is the "absolute insurer" of a horse entered to race and expressly states, "[a] trainer is strictly liable and subject to disciplinary action if a horse under the trainer's actual or apparent care and control as trainer has a drug or foreign substance in its body, in violation of section 30 [MCL 431.330] and the rules promulgated under that section." MCL 431.316(6). Moreover, this Court has explained that the strict liability statute is part of Michigan's strong regulation of horse racing: "Horse racing is accompanied by legalized gambling, making the activity especially susceptible to fraud and corruption. Strong regulation protects not only the wagering public but also advances the state's economic interests in the racing business by preserving public confidence in the activity." *Berry v Mich Racing Comm'r*, 116 Mich App 164, 171; 321 NW2d 880 (1982). The *Berry* Court interpreted a prior version of the statute and recognized "[t]he imposition of strict liability is reasonable because the trainer is the person best able to prevent illegal drugging. The insurer rule provides maximum protection against illegal drugging; arguably it is the only practical means of reducing such corrupt practices." *Id*.

The circuit court concluded that because the horse needed flunixin at the time it was injured, the imposition of strict liability based upon the flunixin level was arbitrary and capricious. This conclusion disregards the interaction between MCL 431.316 (section 16) and MCL 431.330 (section 30). Section 16 imposes strict liability upon a trainer if the trainer starts a horse that has an unauthorized drug in its body. Section 30 prohibits administering a drug to a racehorse that participates in a race, unless the drug is authorized by the racing commissioner. Defendant properly found plaintiff strictly liable for the presence of the drug, and the circuit court erred in reversing defendant.

Defendant's decision cannot be deemed arbitrary, because the decision derives directly from the controlling statutes. To be arbitrary, the decision must be "without adequate determining principle" or "without consideration or adjustment with reference to principles, circumstances, or significance." *Romulus*, 260 Mich App at 63 (internal quotations and citations omitted). Here, the determining principles are contained in sections 16 and 30. These sections do not allow adjustment or reference to individual circumstances. Accordingly, the circuit court erred in determining that defendant's decision was arbitrary.

Similarly, the circuit court erred in finding defendant's decision capricious. A decision is capricious if it is "apt to change suddenly" or is "freakish." *Id*. The circuit court reasoned that the decision was capricious on the ground that no violation would have been found had plaintiff administered Phenylbutazone to the horse rather than flunixin. The court stated that Phenylbutazone is "much more toxic to a horse" than flunixin. The circuit court's reasoning improperly substitutes the court's pharmacological judgment for that of defendant. Defendant has authorized Phenylbutazone under certain circumstances; defendant has not approved flunixin for those circumstances. Nothing in defendant's authorization decision appears to be susceptible to sudden change or freakish. Rather, the decision would change only on the basis of a statutory

or regulatory change. The circuit court thus erred in finding defendant's decision to be capricious.

Given that defendant's decision was neither arbitrary nor capricious, the decision cannot be deemed to have violated plaintiff's substantive due process rights. "To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). This Court upheld the horse trainer strict liability statute against a constitutional challenge in *Berry*, 116 Mich App at 168-169, and nothing has since changed that causes application of the statute to "shock the conscience." Strict liability is a strong, even severe, standard, but it is not an arbitrary or capricious standard. Given the accepted state interest in strong regulation of the racing industry, and our Legislature's determination that strict liability is an appropriate standard, the imposition of strict liability in this case is constitutionally valid.

In his cross-appeal, plaintiff presents multiple challenges to defendant's decision and to certain aspects of the circuit court's decision. Most of plaintiff's challenges appear to stem from four factual assertions: (1) defendant's drug test incorrectly reported the horse's flunixin levels; (2) flunixin is less toxic than Phenylbutazone; (3); flunixin is not prohibited in racehorses that are not intended to be entered in a race; (4) plaintiff relied upon a guideline that horses may race 48 hours after receiving flunixin. None of these assertions support reversal of defendant's decision.

Regarding the horse's flunixin levels, we find no clear error in the factual finding that the horse's levels constituted a positive test result. Similarly, we find nothing in the record to require us to ignore the regulatory decision to authorize Phenylbutazone rather than flunixin. Regarding plaintiff's argument that flunixin is permitted for use in injured horses, we conclude that the argument is misplaced. The issue here was not whether flunixin is permitted in injured horses; the issue is whether flunixin is permitted under MCL 431.330. Plaintiff's argument ignores the grammatical context of MCL 431.330. The statute is phrased in the disjunctive—it prohibits administering an unauthorized drug to a horse "that is intended to be entered, is entered, *or* participates in a race." MCL 431.330(1) (emphasis added).

This Court cannot ignore the grammar in a statute; rather, the Court must apply the statute in keeping with the plain statutory language and the grammatical context. *Bush v Shabahang*, 484 Mich 156, 167, 772 NW2d 272 (2009). The Legislature's use of the disjunctive "or" and its use of commas in a series demonstrates that the statute prohibits unauthorized drugs in horses at three separate horse racing phases: (1) horses that are intended to be entered in a race; (2) horses that are entered in a race; or (3) horses that participate in a race. See *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010) ("or" is a disjunctive term). Here, the record demonstrates that the horse at issue was entered in and participated in a race. The statute contains nothing to support or require an inquiry into whether, at the time the trainer gave the drug to the horse, the trainer intended to enter the horse in a race.

With respect to plaintiff's reliance on a 48-hour guideline, we follow this Court's rejection of a similar claim in *Sanders v Racing Comm'r*, 151 Mich App 99; 390 NW2d 206

(1986). We agree with the circuit court that plaintiff did not rely on any established policy at the time he administered the flunixin.

Reversed and remanded for reinstatement of defendant's final decision. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey